SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

No. **1162**

MERLANDS CLUB, INC.,

Petitioner,

v.

VICTOR R. MESSALL AND ROBERT E. HOWE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND STATE OF MARYLAND

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The Petitioner, Merlands Club, Inc., a Maryland corporation, prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the State of Maryland.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in *244 Md. 18, 222 A.2d 627*, as well as two preceding opinions, re same parties and same subject matter, in *233 Md. 29, 194 A.2d 793* and *238 Md. 359*,

JURISDICTION

Judgment was entered on September 13, 1966. A timely application for rehearing or reargument was denied by the Maryland Court of Appeals on October 20, 1966. On January 10, 1967, Chief Justice Earl Warren signed an Order extending the time for filing this Petition for Writ of Certiorari to and including March 18, 1967. The jurisdiction of this Court is invoked under 28 U.S. 1257 (3).

QUESTION PRESENTED

Whether, consistently with the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment, a state court may deprive a party, without compensation, of his or its constitutional right to property by validation of an invalid court determination through the aegis of res judicata, wherein such principle of res judicata was actually a premise for invalidation and nullity rather than the aforementioned validation.

CONSTITUTIONAL PROVISIONS INVOLVED

Sec. 1, Fourteenth Amendment, United States Constitution:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Landlords, hereinafter referred to as "Respondents", have at all pertinent dates involved herein, been the owners of certain real estate located in Montgomery County, Maryland, known as "Merlands". The Respondents leased the said premises to Petitioner under a lease dated June 1, 1956, and amended October 26, 1956. (Pl. Exh. 1, E 314-332). Respondent Messall, a resident of Montgomery County, owns a three-fourths (3/4) interest in said property, and Respondent Howe, a resident of the State of New York, owns a one-fourth (1/4) interest in said leased property.

The leased premises, formerly the estate of Respondent Messall, consisted of approximately twenty-three and one-half (23 1/2) acres of land improved by a 22-room three-story clubhouse, swimming pool, tennis courts, riding ring, and fishing lake, which were used and operated by Petitioner as a private family country club.

The lease provided for an initial tenancy of seven (7) years, commencing April 1, 1956 and ending March 31, 1963, with an option in Petitioner to renew the lease term for an additional five (5) years (Par. 5 of Lease). The Petitioner did not exercise its option to renew the lease term (Messall, E 115).

The lease further granted Petitioner an option to purchase upon certain conditions precedent, which option was effective only at the end of the initial seven (7) year term, or at the end of the extended five (5) year term. The right to exercise the purchase option at the end of the original term was to be exercised by

notice in writing to Respondents during the period October 1, 1962 to December 31, 1963, and if not so exercised during such period the said purchase option became a nullity (Par. 6 of Lease). The option provision of the lease (Par. 6 of Lease), reads in pertinent parts, as follows:

> "6. The Lessee shall, provided said Lease has not been terminated prior thereto, and Lessee is in compliance with all its obligations herein set forth, have an option to purchase the above described land, premises, improvements thereon, facilities, appurtenances, permits, and rights, at a purchase price to be established by a committee of three (3) independent appraisers. * * *"

Other pertinent provisions of the Lease are as follows:

> "2. The Lessee does further covenant and agree as follows: * * *
>
> "(e) To keep and maintain at its own expense the demised premises in good repair, including painting, as the same shall be at the commencement of this lease, ordinary wear and tear arising from reasonable use of the demised premises excepted; * * * and provided further Lessee shall deliver up said demised premises at the end or expiration of the term of this lease in as good condition as at the commencement of this lease, ordinary wear and tear excepted; * * *
>
> "(f) Not to materially disfigure the demised premises or buildings, or any part thereof, or permit it to be done by others; and provided further Lessee shall make no material or structural alterations, additions or improvements in

or to said demised premises without the prior written consent of Lessor; * * *

"4. (i) That the waiver by Lessor of any breach of any term or provisions hereunder by Lessee shall not operate, or be deemed, to waive any future breaches of said term or provisions of this lease to be performed by Lessee."

On November 16, 1962, the Respondents' counsel notified Petitioner that the lease was declared in default for failure to pay proper rent (Pl. Exh. 4, E 335) and Respondents have not accepted any rental from and after the rental due for the month of November 1962 (Messall, E 125).

Under date of December 31, 1962 Respondents rejected Petitioner's exercise of the purchase option because the lease had been declared in default in the month of November 1962 for failure to pay proper rentals, contending the Petitioner had otherwise failed to perform its obligation under the lease (Pl. Exh. 3, E 333).

On April 1, 1963, Petitioner commenced suit in the Montgomery County Circuit Court against Respondents for specific performance of the purchase option, being Equity No. 26628, hereinafter referred to as the "Specific Performance Case" (E 2, 8).

On May 20, 1963, Respondents filed their answer to Petitioner's suit for specific performance (E 2, 19), and on May 21, 1963, Respondents filed a cross-bill seeking a declaratory judgment to declare the lease in default and terminated as of November 16, 1962 and to declare invalid the exercise by Petitioner of the purchase option (E 2).

On April 5, 1963, Respondents filed in the Montgomery County Circuit Court a separate action, Law

No. 13557, claiming ejectment by Petitioner from and after April 1, 1963 on the basis that the lease had expired by its own terms on March 31, 1963 (E 401, 402), which suit is hereinafter referred to as the "Ejectment Case". Petitioner filed, on May 24, 1963, its original Pleas on the Ejectment Case (E 401, 404).

On October 10, 1963, Respondents dismissed their cross-bill for Declaratory Judgment in Equity 26628, and filed a suggestion of removal in the Ejectment Case, Law 13557 (E 2, 401).

On October 11, 1963, the Montgomery County Court ordered the Ejectment Case transferred to the Baltimore County Circuit Court, where it became docketed as Law No. 54778 (E 401, 405). On May 1, 1964, the Baltimore County Circuit Court ordered the Ejectment Case transferred to Caroline County Circuit Court, where it was docketed as Law No. 2374 (E 406, 411).

The Ejectment Case, Law 2374, was commenced in the Caroline County Court on June 22, 1964 and concluded on June 24, 1964, after three (3) days of trial (E 411-414).

On June 19, 1964, Petitioner filed a Motion for leave to amend its pleas in the Ejectment Case, and prior to commencement of trial on June 22, 1964, the Caroline County Court granted the motion and Petitioner's amended pleas were received that date (E 412, 436-442). Petitioner's amended pleas (E 420), included a plea in bar to the jurisdiction of the Court (Par. 3), a plea (Par. 4) of res judicata by reason of *Messall et al. v. Merlands Club, Inc.*, 233 Md. 29, 194 A.2d 793, and a plea on equitable grounds (Par. 5) to the effect that Petitioner had validly exercised its purchase option under the lease and thus had equitable title to the premises as of April 1, 1963.

Written briefs were filed and oral argument was had before the Caroline County Court on July 12, 1964 and on July 24, 1964, the Caroline County Court issued its Order finding Petitioner guilty of trespass and ejectment from April 1, 1963 and awarded damages to Respondents in the amount of $34,384. On the same date, July 24, 1964, a judgment nisi on the verdict was entered (E 413). On July 27, 1964, Petitioner filed its appeal line (E 413). On July 28, 1964, a judgment absolute on the verdict was entered in favor of Respondents (E 413), following which, since Petitioner had not filed any supersedeas bond with its appeal, Respondents obtained, on July 28, 1964, a Writ of Habere Facias Possessionem and by enforcement of said Writ entered into possession of the premises on or about July 30, 1964 (E 414).

On September 30, 1964, the Caroline County Court filed its Opinion in the Ejectment Case (E 414, 426) wherein it found against Petitioner on all of its amended pleas.

On Motion of Respondents, the Maryland Court of Appeals, on April 14, 1965, dismissed Petitioner's appeal from the Caroline County Circuit Court's decision in the Ejectment Case, Law No. 2374, on the basis that the appeal filed on July 27, 1964 was an appeal from a judgment nisi and thus premature. Since no appeal was taken within the prescribed appeal period from the entry of final judgment entered on July 28, 1964, the appeal was required to be dismissed. (Maryland Court of Appeals No. 396, Sept. Term 1964) Reargument was denied by the Maryland Court of Appeals on May 25, 1965 and the Mandate dismissing the appeal was entered in the Caroline County Court in Law 2374 on May 26, 1965 (E 414).

The Specific Performance Case commenced in the Montgomery County Circuit Court on August 10, 1964, August 12, 1964, August 24, 1964, August 25, 1964, August 26, 1964, September 1, 1964, September 2, 1964, September 3, 1964, September 8, 1964, and September 9, 1964. On September 7, 1965, the Montgomery County Court issued its Opinion and Decision in Equity 26628 which was entered on September 8, 1965 (Docket Entries, E 6; E 52-89), wherein it decided that Petitioner was entitled to specific performance.

On September 23, 1965, Respondents filed their appeal (Docket Entries E 7) along with a supersedeas appeal bond in the sum of $25,000, as approved by the Clerk of the Montgomery County Circuit Court (Docket Entries, E 7.

A prior case, between these same parties, is the case of *Messall et al. v. Merlands Club, Inc.*, 233 Md. 29, 194 A.2d 793, decided by the Maryland Court of Appeals on November 12, 1963, rehearing denied January 3, 1964, which case was instituted by Petitioner in June 1961 with a cross-bill filed by Respondents in August 1961, discussed *infra.*

On October 31, 1962, the Charter of Petitioner was forfeited by Proclamation of the Governor of Maryland for failure to file reports and pay taxes (Def. Exh. 25, E 398). A Certificate of Revival was filed January 27, 1964 (Pl. Exh. 9, E 361).

The Maryland Court of Appeals on September 13, 1966 handed down a decision reversing the decree of the Montgomery County Circuit Court in favor of the Petitioner (copy App. A). A Motion for reargument or rehearing was denied on October 20, 1966, and final judgment for Respondents was entered on that day. It is from this judgment of the Maryland Court

of Appeals, encompassing prior cases inyolving the same parties and the same subject matter, as to the principle of res judicata that this Application for Writ of Certiorari is being submitted.

RAISING THE FEDERAL QUESTION

In arguments presented to the Court of Appeals of Maryland, the Petitioner herein, in categories 1 and 2 (cf. Appellee's Brief filed in the Record), raised the question of res judicata and its effect on the rights of the Caroline County Court's decision through the lack of jurisdiction of that court due to the principle of res judicata applying to the facts attempted to be determined by that court. The clear meaning of the arguments was the lack of due process and consequential ejectment of the Petitioner as the result of the verdict of that court which subsequently was determined by the Court of Appeals of Maryland to be valid in carrying a consequential, conclusive adjudicating effect on the Montgomery County Circuit Court, which rendered a decision in favor of the Petitioner in the third case. This latter court had also acted on the Specific Performance Case in this trilogy. The federal question was starkly at issue as cited above under the Federal Question Section and Reasons for Granting Writ.

REASONS FOR GRANTING THE WRIT

1. The decision below cavalierly ignored or failed to recognize the relative position of (a) the issues that were tried as factual matters in all three cases (being the same); (b) the time of such consideration and adjudication per the records of the trials; (c) the great weight that must be given to the meaning and statements of the Chancellor in the Specific Performance Case (#3) and the Declaratory Judgment Case (#1)

since he was the same Chancellor in both -- one preceding the law (Ejectment) action and the other following the law (Ejectment) action, although filed prior in pleading to the law action. This provided a unique and singular characteristic not usually present in these cases as to the exclusive knowledge of the facts and issues that were tried in both cases. This was the basic area of conflict since the parties and subject matter were patently the same in all cases. The arbitrary decision, as set forth by the Maryland Court of Appeals, is underscored by the failure to recognize the Montgomery County Court's determination as to what issues had been determined by the Declaratory Judgment Case (actually affirmed by the same Court of Appeals in *233 Md. 29*, and completely substantiated by admissions of the Respondents, as shown by the record as contained in Petitioner's lower court appeal brief (cf. page 15 of Appeal Brief) which mandated the application of the principle of res judicata as to the pertinent facts that were tried in the law action (Ejectment) in Caroline County.

The first case involving these parties and the subject matter was the one that had been filed in June of 1961, wherein the Petitioner filed for Declaratory Judgment as to the ownership of certain insurance funds. In August of 1961, the Respondents herein filed a counter-claim by cross-bill and a suit for ejectment based on violation of the lease for failure to pay proper amount of rent and properly maintain the club by appropriate repairs. These cases were consolidated by consent. The case was ultimately determined by the lower court, the same court that heard the Ejectment case, that a mutual mistake of fact had occurred as to the rental payments, that the repair and maintenance claim had been abandoned at time of argument by the Respondents, and that with the meeting of certain

conditions, the claim of the Respondents would be dismissed. This determination was appealed and affirmed by the Court of Appeals of Maryland. The time area with which that case was concerned ran from its filing date in June of 1961 through January of 1963, at which time a final order and decree was issued by the lower court. The period of time involving these issues of rent, as well as repair and maintenance was collateral with the issuance of the decree in January of 1963. The Court of Appeals of Maryland in affirming the lower court in *Messall v. Merlands* (233 Md. 29) clearly indicated the correctness of the lower court's decision and, in addition thereto, affirmed the correctness of the decision in two main aspects:

1. That a mutual mistake of fact did exist as to rent and that in that respect the Petitioner herein was within its right and prerogative to refuse to change the amount of payment in November of 1962, in the middle of litigation;

2. That the evidence of repairs made by Petitioner was substantial, and that the claim of breach was without premise in that respect and immaterial at the most.

A reading of the opinion in *233 Md. 29* will fully reveal a complete substantiation of the position contended by Petitioner as to this case, both as to rental payments and proper repair. A review of Petitioner's brief filed in *244 Md. 18*, pages 5 through 19, will reveal the complete basis of the position of the Montgomery County Chancellor in Equity to be the proper determinant of the facts previously adjudicated.

There must be a concurrence by all parties involved of the basic principle of res judicata. In *Johanessen v. U. S.* (225 U.S. 227), this court pointed

out that the basic premise of res judicata is found in the fact that both parties have had their day in court on questions of fact that have been put in issue and, once having done so, cannot be reconsidered between the same parties in subsequent matters. (*Postal Telegraph Co. v. Newport*, 247 U.S. 464; *Baker v. Cummings*, 181 U.S. 117; *Lauder v. Mercantile National Bank*, 46 L.Ed. 776; *U. S. v. California Bridge Construction Co.*, 245 U.S. 337). As set forth in *Sterling v. Local 348*, 207 Md. 132, the earlier judgment not only concluded the parties as to facts actually litigated but also as to any matter admissible for litigation or susceptible of litigation at the earlier point of time (*Harshman v. County Court*, 122 U.S. 306; *Cromwell v. Sac County*, 94 U.S. 351; *U. S. v. Haitian Republic*, 154 U.S. 118). It is interesting to note that this Court also included the duty of reasonable diligence on part of parties for the inclusion of any matters susceptible of litigation at the time. The existence of reasonable diligence, whereby such matters have been brought to the attention of the court and its necessity is found in *Beloit v. Morgan* (7 Wall. 619; *Gould v. Evansville C.R. Co.*, 91 U.S. 526; *Grubb v. P. V. C.*, 281 U.S. 470. In *Jackson v. Irving Trust Co.*, 311 U.S. 494, this Court indicated that the question of whether a particular issue was actually litigated was immaterial as to the question of conclusiveness of a decree where there had been full opportunity to litigate it, and the adjudication had been undertaken by decree. This is important in light of the position of the Respondents as to the question of whether they had abandoned their argument as to repairs and maintenance. It would seem that the abandonment would have amounted to a complete waiver of all issues relevant or susceptible of litigation at that time. In the converse, if there was no abandonment, then there is no question as to the matters being present or susceptible for litigation.

A review of the record, as well as the briefs and arguments submitted therein in conjunction with the opinion of the Maryland Court of Appeals indicates the paramount position of importance of the determination of the Chancellor in the Montgomery County Equity actions, and in contrast, the complete by-passing of such important position by the Maryland Court of Appeals in their ultimate determination.

2. The Petitioner raises a jurisdictional question relating directly to the scope and validity of the judgment in the Ejectment case, which created a nullity in the ultimate determination by that court and the interpretation of the judgment by that court by the inclusion of the opinion to control such judgment.

The initial point and source of survey with the Caroline County Court as to the question of res judicata must be the Judgment rendered by the Caroline County Circuit Court. It is well established that the question of res judicata or estoppel as to the conclusiveness of matters determined by a court will be found within the confines of the judgment itself.

> "The force of the estoppel lies in the judgment itself; it is not the finding of the court or the verdict of the jury which concludes the parties, but the judgment entered thereon. Likewise, the conclusiveness of an adjudication depends on the source from which it came and the issues it determined, and not on the violence of the controversy. The reasoning of the court in rendering a judgment forms no part of the judgment, with respect to its conclusive effect, nor are the parties bound by remarks made or opinions expressed by the court in deciding the cause, which do not necessarily enter into the judgment." (50 *C.J.S.* 686; 50 *C.J.S.* 725, 726;

Venetzanos v. Pappas, 184 A. 489; *Dobbins v. Title Guarantee*, 136 P.2d 572; *Title Guarantee & Trust v. Monson*, 81 P.2d 944)(Emphasis supplied)

A reference to the judgment issued by the Caroline County Court clearly reveals that an adjudication as to trespass from April 1, 1963 up to the time of repossession (July 28, 1964) was adjudged and that damages for occupation, based on a fair rental value, were awarded. The judgment itself makes no mention of damages prior to April 1, 1963, except to disallow such damages, since the court in its own words had no premise for such adjudication or determination. The court in the judgment specifically spells out the time and eliminates any other period of consideration. A reference to the order itself shows that in the court's opinion only damages caused by the unlawful possession and ejectment since April 1, 1963 were allowable. A reference to the opinion of the Caroline County Court, though as stated earlier irrelevant and immaterial as to the judgment and its conclusiveness for the purposes indicated here, completely substantiates the contention of the limitation of the judgment, wherein the Caroline County Court states:

"Since the damages are limited to those caused by reason of the ejectment on April 1, 1963, and therefore occurred subsequent to April 1, 1963, there is no legally sufficient basis established by the evidence upon which this element of damages can be assessed or divided between the portion that occurred prior and subsequent to April 1, 1963, and therefore this element must be disallowed as a part of the damages in this action, although it may be assertable in another civil action for debt."

This Court's decisions clearly reveal the restrictiveness in dealing with the question of res judicata as to judgments wherein this Court stated that judgments, valid in ejectment, have conclusiveness only as to matters necessarily proved as to validity of lease, possession of defendant, obligation to pay rent and the amount due (*Sheets v. Selden*, 7 Wall. 416, 19 L.Ed. 166). In this relation, it is interesting to note that in some jurisdictions, such as Pennsylvania or Texas, judgments in ejection suits are not conclusive. In Pennsylvania, a single judgment in ejectment is not conclusive (*Gibson v. Lyon*, 115 U.S. 439); in Texas, such judgment does not become conclusive if a new action involving the issues is brought within one year of the judgment (*Brownville v. Cavazos*, 100 U.S. 138). These determinations all lead to the ultimate criterion of conclusiveness only as to what was actually adjudicated as found in the judgment. This, of course, has distinct relation to our initial point as to scope of the judgment. There seems, however, to be little question that an Equity Court had the right to make inquiry into any prior adjudication that would color or determine whether a previous court had acted without premise and in a void manner. The wide variance between the nature of an ejectment suit, strictly in Law, and the nature of a specific performance suit, strictly in Equity, needs little comment. It is a well-established principle of law that "any doubt" as to the identity as to the causes of the action in the two suits must be resolved in favor of the party against whom the plea of res judicata is asserted (50 *C.J.S.* 648).

It must be said here that if the principles as enunciated, *supra*, as to the judgment itself being the controlling factor, the Caroline County Court obviously felt that there was no effect to be had on the Specific

Performance case. It would seem that the Caroline County Court dealt with the question of exercise of option, not being included in the order of judgment on an obiter dicta basis in the opinion, and would seem to come within the limitations of the case of *Fayweather v. Ritch* (195 U.S. 276), wherein this Court stated:

> "Where testimony is offered in several distinct issues, no res judicata since determination is not adjudicated on the particular issue or issues.

It is respectfully submitted that nowhere in the order of the Caroline County Court is there a reference to the option to exercise.

Another important area of further consideration is that dealing with the element of defense in relation to res judicata. In the particular case with which we are dealing the question of equitable defense specifically is the point of consideration. In The Restatement of the Law No. 66, dealing with judgments, it is stated that equitable claims and defenses and their effect as to conclusiveness is dependent upon a merger of Law and Equity as to remedies. It is well-established that a complete merger of Law and Equity is not present in Maryland to the extent that a Law Court can give full relief to one who initially must seek that relief in Equity. In 50 *C.J.S.* 683 it is stated:

> ". . . that a judgment in Law will not conclude defenses which were of a purely equitable nature" (*Nehring v. Nemerowicz*, 276 N.W. 325).

There can be no question, as the pleadings will reveal, that this plea was of a purely equitable nature and that the Caroline County Court, sitting as a Court of Law in an ejectment suit, could not render full relief by ordering specific performance be had on behalf of

Merlands Club. In 50 *C.J.S.* 684 it is further stated:

> ". . . that the Rule (res judicata) has been held inapplicable where the former defendant was necessarily confined to the use of his set-off or counter-claim to a defeat of plaintiff's demand and was not permitted to claim an affirmative judgment." (*Borden v. VanCott*, 56 N.Y.S. 554)

In this particular case, it should be noted that there was no set-off or counter-claim entered. It was merely brought to the attention of the court as a premise for remaining on the property under an equitable title, and it dealt with a period pursuant to April 1, 1963, following the expiration of the written lease, which was the sole premise for the ejectment suit by the defendants. Additionally, the courts have held that a complainant may come into Equity and set up in vindication of his rights those defenses which were rejected in an action of Law (50 *C.J.S.* 683, *Palisades Gardens v. Grosch*, 185 A. 27). The New Jersey Court in the *Palisades* case, *supra*, in citing the Court of Appeals in the case of *Headley v. Levitt* (55 A. 731) stated:

> "Under the circumstances we think the contract was an existing one at the time of the trial, and that the complainant had an equitable defense to the action, which was not within the jurisdiction of the common-law court to consider.
>
> This being so, the complainant is not barred in equity from seeking the remedy that was determined adversely to him in the law court. The rule is that, where a party has equitable rights not cognizable in a court of law, which would in a court of equity have prevented such an adjudication as was made in the court of law, the judgment will interpose no obstacle to re-

> dress in equity, since the court of law had no proper jurisdiction of the subject matter forming the basis of redress in equity. (2 Story, Eq. Jur. 1673). In *Smalley v. Line, et al.* (28 N.Y. Eq. (1 Stew.) 348) it was held that the fact that a complainant attempted to set up a merely equitable defense in a suit at law will not debar him for subsequently setting it up in a court of equity against the judgment. This doctrine is sustained also in *Hughes v. Nelson* (2 Stew. (29 N.J. Eq.) 547)."

This principle is further substantiated in The Restatement of the Law, Judgment No. 71, wherein it is stated:

> "Where Original Court had No Jurisdiction to Directly Determine the Matter"
>
> "Where court has inadvertently determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgment is not conclusive in a subsequent (or other) action brought to determine the matter directly."

This seems to be quite conclusive as to the effect of res judicata, unless a court can give full determination and relief on a mutual basis to both parties. Even if it had been shown in the Judgment (and it was not) and if reference had been made to the question of exercise of option (and it was not), as well as damages in the period of time in which the option was exercised, this particular principle stated here would still have barred any conclusive effect. However, in this case the judgment resolves any problem that might have arisen along those lines by eliminating the necessity of such consideration since the judgment restricted itself to the ejectment suit.

A final word in respect to jurisdiction. It is a well-accepted principle that judgments and decrees which are void are binding nowhere (*Hollingsworth v. Barbour*, 4 Pet. 466, 7 L.Ed. 92). Accepting the correctness and accuracy of the position of the lower court in Equity 26628 (Specific Performance Case) as set forth in its opinion, and as a complement herein, the Petition respectfully raises serious question as to the validity of the Caroline County judgment.

3. The question of forfeiture of Charter was raised by the Maryland Court of Appeals. In relation to this question, Article 23, Section 85 (d), Annotated Code of Maryland, dealing with the effect of revival is controlling in this instance. The Respondents herein rely primarily on the case of *Atlantic Mill & Lumber Realty Co. v. Keefer*, 179 Md. 494, 20 A.2d 178, in determining that forfeiture voided the action of the corporation in exercising its option. The section concerning revival is self-explicit in its wording and any construction, based on giving the words their ordinary meaning, can only lead to the legal conclusion that once revival takes place, all acts undertaken by the corporation are made valid as if the Charter had at all times remained in full force and effect, and this validity is retroactive. Article 23, Section 85 (d) of the Annotated Code of Maryland (Michie 1957) states:

> "Such revival of the charter of the corporation shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by the corporation, its officers and agents during the time when the charter was void, with the same force and effect and to all intents and purposes as if the charter had at all times remained in full force and effect. All real and personal property, rights and credits of the corporation at the

> time its charter became void and of which it was not divested prior to such revival shall be vested in the corporation after such revival, as fully as they were held by the corporation at the time its charter became void. The corporation after such revival shall be liable for all contracts, acts, matters and things made, done or performed in its name and on its behalf by its officers and agents prior to such revival as if its charter had at all times remained in full force and effect."

The *Atlantic Mill & Lumber Realty Co.* case, *supra*, relied on by the Respondents, was one in which the revival never took place so that the court was faced with little alternative but to declare the action taken by the plaintiffs as void. However, a reading of that case will reveal that, had advantage been taken of the Revival Statute, a different effect would have ensued. On page 180 of 20 A.2d, the Maryland Court of Appeals makes the following statement:

> "A provision is made for the reviving of such charter which, apparently, was not taken advantage of in this case."

Obviously, had the revival taken place, validity would have ensued. Reference to the case of *Redwood Hotel v. Korbien*, 197 Md. 514, 80 A.2d 28, quickly reveals the over-all retroactive effect of revival. In that case, the complainants moved to dismiss the appeal on the ground that the charter of the appellants, the Redwood Hotel, Inc., was forfeited in November of 1949 for non-payment of 1948 franchise taxes, and that since forfeiture occurred in 1949 and the appeal was entered in November of 1950, the appeal should be dismissed since the corporation was no longer in existence as such at the time and could not act as a

legal entity to enter an appeal. The corporation, however, was revived by the State Tax Commission in December of 1950 and, at the time of the determination by the Maryland Court of Appeals, was in existence. The Court of Appeals in that particular case and under the circumstances prevailing cited the Revival Statute and determined that the appeal would not be dismissed since such revival was retroactive and validated all acts of the corporation as if there had been no forfeiture. The circumstances in this case are quite similar in that forfeiture was made in October of 1962 but was revived in January of 1964, prior to the determination of either the Law or Equity case. The effect of the Revival Statute is quite clear. Collaterally, the corporation still could be operating de facto, and the argument advanced by Respondents as to a devolving of assets on someone other than the corporation is facetious in light of the fact that the trustees act in place and on behalf of the corporation in every respect and so acted pursuant to the forfeiture, as well as prior to it. The meaning of the devolvement of assets on someone else can be reasonable only when it means someone other than one previously holding in the name of the corporation. No change was ever effected in any instance in this case. However, the meaning of the Statute pursuant to construction, as well as the law applied by the Maryland Court of Appeals, conclusively determined the complete retroactive aspect in validating in every respect any act undertaken or "thing done" by the corporation during any period of forfeiture. It is also a matter of record that at no time during the period of rejection by the Respondents of the option to exercise did they rely on such forfeiture. It was completely without their knowledge. There is no question, even if they had knowledge at the time and relied upon it,

that a revival would have cured the defect. In light of the law as intended, it would have even under those extreme circumstances.

CONCLUSION

This case, as indicated previously, raises a unique situation in relation to the question of res judicata. Its very uniqueness emphasizes and underscores its materiality to the character of the Writ that is being respectfully requested. In most of these cases, two distinct courts are at odds as to the determination of fact. This element was true in this instance, also, to the extent that the Montgomery County Circuit Court and the Caroline County Circuit Court were at issue as to what facts had been determined in the first case between these parties, involving the same subject matter. The singularity and uniqueness becomes apparent when it is discovered that the Chancellor, who rendered his decision and decree in the second Equity (#3) case in this trilogy, known as the Specific Performance Case, was also the Chancellor in the first case, the Declaratory Judgment Case, which should have precluded any action by the Caroline County Court in the ejectment action as to any facts that had been determined in the first case.

It is because of this singular position that this Court is vigorously urged to read the opinions of the circuit courts in these cases, especially in the Specific Performance Case (case #3). Unless this Court takes action and intervenes, the Court of Appeals of Maryland will have set a precedent that runs contrary to the generally accepted principle of giving the Chancellor a heavy presumption and consideration of correctness in his determinations as to all facts and will not reverse unless he is clearly in error. In this in-

stance, the Chancellor could have been no more explicit in substantiating his determination that res judicata applied in the facts determined by the Caroline County Circuit Court to allow it to find against the Petitioner herein. This error should be quickly corrected. For these reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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